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IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 552

STATE OF IDAHO, *Petitioner*,

vs.

DAVID ARTHUR

On Petition for Writ of Certiorari to the Supreme Court of the State of Idaho

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BRIEF FOR RESPONDENT

OPINION BELOW

The opinion of the Supreme Court of the State of Idaho (R. 15-29) has not as yet been reported officially. It is reported unofficially in 261 P. 2nd 135, Adv. Sh., October 23, 1953.

JURISDICTION

The judgment of the Supreme Court of Idaho was entered on August 21, 1953. A petition for rehearing was filed on September 10, 1953 and was denied October 6, 1953. On December 28, 1953 Mr. Justice Douglas entered an

order extending the time for filing a petition for a writ of certiorari to February 1, 1954. The petition was filed on January 28, 1954. The jurisdiction of this court has been invoked under 28 U.S.C. Sec. 1257(3).

QUESTION PRESENTED

The legal question presented has been stated succinctly by the State Court (R. 15):

"[W]hether the defendant, as a member of the Nez Perce tribe, was entitled to hunt wild game on lands ceded by the Nez Perce tribe to the United States by the Treaty of 1855, which lands are now a part of the Nez Perce National Forest, during the closed season in disregard of the statutory laws of Idaho."

STATUTES AND TREATIES INVOLVED

The Nez Perce Treaties and Agreement in question here are the Treaty of 1855 (12 Stat. 957), the Treaty of 1863 (14 Stat. 647), and the Agreement of 1893 (28 Stat. 331). The state statutes under consideration, Idaho Code Secs. 36-103, 36-104, 36-108, and 36-301 appear in Petitioner's Brief, pp. 7-10. The relevant regulations issued thereunder appear in Appendix A to Petitioner's Brief, pp. 64-66.

STATEMENT OF THE CASE

The respondent, David Arthur, is a member of the Nez Perce Tribe of Indians. On September 26, 1951 he killed a deer on the Nez Perce National Forest, in Idaho County, Idaho, outside the boundaries of the present reservation, but within the area ceded by the Nez Perce Tribe of Indians under Article I of the Treaty of 1855, 12 Stat. 957. He was thereafter charged with having killed said deer out of season, in violation of the conservation laws of the State of Idaho and the regulations issued thereunder (R. 2). Respondent contended that in view of his rights under the Nez Perce Treaty of 1855, the State

conservation law in question was inapplicable to him under the circumstances of the case.

Respondent was tried in the Probate Court of Idaho County, Idaho and was found guilty. On October 29, 1951 judgment was entered against him in the sum of $100 (R. 8). On appeal to the District Court of the Tenth Judicial District of the State of Idaho the State's complaint was ordered dismissed on the ground that the facts charged did not constitute a crime (R. 11-12). The Supreme Court of the State of Idaho affirmed that decision in a unanimous opinion, holding the State conservation laws and regulations inapplicable to the facts of the case since respondent had acted within his rights under the Nez Perce Treaty of 1855 (R. 15-29).

SUMMARY OF ARGUMENT

The crucial holding of the Supreme Court of Idaho is that the Nez Perces' right to hunt upon open and unclaimed land within the area ceded by them to the Federal Government, reservd to them by the Treaty of 1855, 12 Stat. 957, has never passed from them and may be exercised today on the Nez Perce National Forest. That holding is eminently correct.

In arriving at its holding, the Supreme Court of Idaho had to deal with two basic questions. In the first place it had to define the right reserved to the Indians by the Treaty of 1855. Beyond that, it had to examine whether subsequent treaties or enactments extinguished the right or caused it to expire.

ARGUMENT

I. The State Court Correctly Defined the Hunting Rights Reserved to the Nez Perce Indians.

The reservation of hunting rights to members of the Nez Perce Tribe of Indians is contained in Article III of the Treaty of 1855, which provides:

> The exclusive right of taking fish in all the streams where running through or bordering said reservation is further secured to said Indians; as also the right of taking fish at all usual and accustomed places in common with citizens of the Territory; and of erecting temporary buildings for curing, together with the privilege of hunting, gathering roots and berries, and pasturing their horses and cattle upon open and unclaimed land.

Petitioner argues that the State Court erred in holding that the lands in question here are "open and unclaimed" within the meaning of the Treaty of 1855. It contends that the lands had lost their "open and unclaimed" character when they were included in a National Forest.

To determine the meaning of the controversial treaty language, the State Court examined the statements made to the Indians during the negotiations leading up to the conclusion of the Treaty of 1855. In interpreting the treaty in the light of the explanations furnished to the Indians by the Federal negotiators, the State Court correctly applied the rule laid down by this Court in *Jones* v. *Meehan*, 175 U. S. 1, 11 (1899):

> In construing any treaty between the United States and an Indian tribe, it must always be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States: and that the treaty must therefore be construed, not according to the technical meaning of its words to

learned lawyers, but in the sense in which they would naturally be understood by the Indians.[1]

In the instant case, the State Court pointed out, the chief negotiator for the United States at the 1855 treaty council had told the Indians on two successive occasions that they would be allowed to hunt "on land not occupied by the whites" or "on any of the lands not occupied by settlers." (R. 23) From these statements the Court correctly concluded that the terms "open and unclaimed land" must be interpreted to include all lands "not settled and occupied by the whites under possessory rights or patent or otherwise appropriated to private ownership" (R. 24). National Forest lands are thus clearly "open and unclaimed."

Cases cited by Petitioner in opposition to the State Court's conclusion as to the meaning of "open and unclaimed land" stand merely for the proposition that reserved Federal lands are not open to general exploitation by the public. They have no application to the use of the phrase in an Indian treaty. Clearly, treaty language just like statutory language, "must be viewed in [its] setting." *United States* v. *American Trucking Associations*, 310 U. S. 534, 538 (1940).

Petitioner contends further that whatever hunting rights may have been reserved to the Nez Perce Indians in 1855, they were subject to certain inherent limitations which have caused them to expire long since. In that context it relies on the decision of this Court in the case of *Ward* v. *Race Horse*, 163 U. S. 504 (1896).

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[1] This rule has been reaffirmed most recently in *Choctaw Nation* v. *United States*, 318 U. S. 423 (1943), where the Court pointed out that the meaning of treaties is ascertained by an examination of the history of the treaty and the negotiations and then observed: "Especially is this true in interpreting treaties and agreements with the Indians; they are to be construed so far as possible, in the sense in which the Indians understood them, and 'in the spirit which generously recognizes the full obligations of this nation to protect the interests of a dependent people.'" At p. 432.

The case of *Ward* v. *Race Horse* involved the hunting rights of the Bannock Indians under the Fort Bridger Treaty of 1868, 15 Stat. 673. As the State Court points out (R. 20), the Court failed in that case to resort to the minutes made preceding the execution of the treaty. From the language of the treaty the Court deduced that the parties to it had anticipated the advance of civilization and had "never intended the [hunting] right to be continuing." He concluded therefrom that the right was "temporary and precarious" and expired under its own terms upon the admission of Wyoming into the Union.

Whether or not the underlying assumptions of *Ward* v. *Race Horse* are considered justified, it is clear that they are at variance with the facts in this case.[2] As indicated before, the State Court, correctly applying the rule of *Jones* v. *Meehan, supra,* carefully examined the record of the treaty negotiations. It did not find any indication in that record that any of the reserved rights were temporary and precarious. On the contrary, it found that one of the Indians had emphasized the perpetual character of the arrangement by stating his understanding of the Treaty in the following terms (R. 23):

> "I shall do you no wrong and you do me none, both our rights shall be protected forever; it is not for ourselves here that we are talking, it is for those that come that we are speaking."

The case of *New York ex rel. Kennedy* v. *Becker,* 241 U. S. 556 (1916) is similarly inapplicable to the situation in the instant case. As this Court observed in its decision in that case, the Indian fishing right in question there had been granted subject to the inherent limitation that "the existence of the sovereignty of the state was well

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[2] The State Court suggests that the doctrine of *Ward* v. *Race Horse* was repudiated in *Seufert Bros. Co.* v. *United States,* 249 U.S. 194 (1919) (R. 23). However, as the *Race Horse* case is clearly distinguished, that observation is not essential to its decision.

understood, and this conception involved all that was necessarily implied in that sovereignty, whether fully appreciated or not." (p. 563) The Indians involved in the *Kennedy* v. *Becker* case had been aware of the existence of and had dealt with New York long before the United States came into being.

By contrast, the Nez Perce Indians of 1855 had never known any sovereignty but that of the United States. Idaho was not to become a territory for another eight years and was not to become a state for another thirty-five years. As a matter of fact, at the time the Nez Perces concluded the Treaty of 1855, the States of Texas and California were the only sovereign states west of Missouri.

It is thus clear that the Court correctly found that the Nez Perce Treaty of 1855 was not burdened with the inherent limitations on hunting and fishing rights which this Court determined to exist in the treaties under consideration in *Ward* v. *Race Horse* and *Kennedy* v. *Becker* and concluded correctly that the Nez Perces' right to hunt on open and unclaimed land has subsisted to this very day.

The rights claimed by respondent and upheld by the State Court is the right to hunt outside the reservation but within the area of Nez Perce aboriginal occupancy, ceded to the United States under Article I of the Treaty of 1855, if such land is "open and unclaimed" at the time the right is exercised. Petitioner, however, tries to suggest that the State Court upheld the right of the Nez Perces to hunt on any land, both inside and outside the area of Nez Perce aboriginal occupancy, if it was open and unclaimed in 1855.

That Petitioner miscontrues the decision of the State Court is quite evident. The Court held explicitly that the right of the Nez Perces is a right to hunt on the lands *which they had ceded to the federal government* (R. 29). Nor is it a right extending to all lands open and unclaimed at the time of the Treaty. As the State Court pointed out, the right does not extend to lands "settled and occupied

by the whites under possessory rights or otherwise appropriated to private ownership" (R. 24). Yet, prior to the effective date of the Treaty, no private rights of white settlers could have existed on Nez Perce land. See *Johnson* v. *McIntosh*, 8 Wheat, 543 (1823). The privately-owned lands of which the Court spoke were thus necessarily lands acquired subsequent to the Treaty. It is thus clear that the holding of the Court meant that the right to hunt applies only to those lands which are open and unclaimed at the time the right is exercised.

II. The State Court Held Correctly That the Nez Perces' Hunting Right Under the Treaty of 1855 Has Subsisted to the Present Time.

The second basic question to be considered is whether the clearly defined hunting right of the Nez Perces established by the Treaty of 1855, was abrogated by subsequent treaties or enactments.

Subsequent to the Treaty of 1855, the United States entered into two further agreements with the Nez Perce Indians, the Treaty of 1863, 14 Stat. 647, and the Agreement of 1893, 28 Stat. 327. As the State Court correctly points out these agreements did not extinguish the right of hunting on open and unclaimed land and, in fact, "expressly [continue] in full force and effect all provisions of the Treaty of 1855 not abrogated or specifically changed or . . . not inconsistent with [their] provisions."[8] (R. 17).

Petitioner argues that the hunting rights of the Nez Perces under the Treaty of 1855, though not altered by subsequent treaty, were changed by subsequent statutes. It contends further that the State Court erroneously held that Congress had no power to abrogate treaties. An examination of the decision reveals, however, that the Court did not question the power of Congress in that

[8] Treaty of 1863, Article VIII; Agreement of 1893, Article XI.

regard. It decided that Congress had not exercised that power.

With respect to this part of the case, Petitioner relies, in the first place, on the act admitting the State of Idaho into the Union, 26 Stat. 215 (1890). Its contention was correctly rejected by the State Court which observed that "[n]owhere within the provisions of the Admission Act . . . is there any expressed intention to abrogate or extinguish any of the provisions of the Treaty of 1855 nor to relieve the State of the obligations thereof." (R. 18). Repeal by implication, the Court pointed out, is not favored. See *United States* v. *Payne*, 264 U. S. 446 (1924). This is particularly true where, as here, "the Agreement of 1893, subsequent to statehood, expressly provided that the provisions of all former treaties with the Nez Perce Indians which were not inconsistent with the Agreement of 1893 were continued in full force and effect" (R. 19). No reference is contained in that agreement as to any possible termination of rights as a result of the Admission Act of 1890.[4]

Petitioner contends further that the rights of the Nez Perce Indians on National Forest lands were extinguished by the various laws for the establishment and administration of National Forests. The sections of the United States Code cited by Petitioner, however, are concerned with general problems of administration and contain no references to Indian treaty rights. Nor has Petitioner shown that Congress, in enacting the laws in question, had any thought of modifying existing Indian treaty rights. As was stated above, and as this Court has emphasized, repeal by implication is not favored. Petitioner's contention is thus clearly without merit.

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[4] As indicated above, this Court held in *Ward* v. *Race Horse*, *supra* that the Admission Act of Wyoming terminated an Indian treaty right. However, that was true only because the right in question was "temporary and precarious" and expired under its own terms. The Admission Act could effect the treaty right only because of that inherent limitation, being, under the Court's construction, the condition subsequent envisaged by the treaty.

Petitioner seems also to suggest that as to Indians who received individual allotments, tribal hunting rights were terminated by the General Allotment Act of 1887, 24 Stat. 388. In support of that contention it cites *In re Heff*, 197 U. S. 488 (1905). Petitioner has apparently overlooked the fact that *In re Heff* was expressly overruled in *United States* v. *Nice*, 241 U. S. 591 (1916) in which this Court held that "tribal relation and the wardship of the Indians were not to be disturbed by the allotments and trust patents."

The final question to be resolved is whether the State conservation statute under consideration here can operate to cut off an Indian treaty right. The Court's answer is put in terms of a well-accepted principle of constitutional law: "[T]he federal government is paramount and supreme within the scope of powers conferred upon it by the Constitution and it follows that a state must exercise its police power subject to constitutional limitations, if any; the statute of any state enacted pursuant to its police power which conflicts with any treaty of the United States constitutes an interference with matters that are within the exclusive scope of federal power and, hence, cannot be permitted to stand." (R. 25).[5]

In pressing its contention that the state of Idaho had the power to abrogate the Nez Perce treaty right, Petitioner relies heavily on the case of *Tulee* v. *Washington*, 315 U. S. 681 (1942). That case involved the question whether an Indian who had a fishing right under a treaty had to comply with the licensing requirement of the State of Washington before exercising that right. The decision

[5] In *State* v. *McConville*, 65 Idaho 46, 139 P. 2d 485 (1943), the Supreme Court of Idaho, in upholding an Indian's fishing right, had quoted from the decision of this Court in *Board of Commissioners of Jackson County* v. *United States*, 308 U.S. 343 (1939): "'Nothing that the state can do will be allowed to destroy the federal right which is to be vindicated; but in defining the extent of that right its relation to the operation of state laws is relevant. The state will not be allowed to invade the immunities of Indians, no matter how skillful its legal manipulations.'"

of this Court was that he did not have to comply with the licensing requirement as it "cannot be reconciled with a fair construction of the treaty."

Petitioner points out that this Court further observed in the *Tulee* case that "the treaty leaves the state with power to impose on Indians equally with others such restrictions of a purely regulatory nature concerning the time and manner of fishing outside the reservation as are necessary for the conservation of fish." A footnote to this remark cites *New York ex rel. Kennedy* v. *Becker*, 241 U. S. 556 (1916) and *United States* v. *Winans*, 198 U. S. 384 (1905).

It is clear that the above observation was not necessary for the decision in the *Tulee* case. The Supreme Court of Idaho, therefore, correctly characterized it as dictum (R. 26). The Court pointed out further that it did not challenge the power of the State to make certain regulations concerning the manner in which Indians could exercise their treaty rights. The State's power "to enact reasonable laws for the conservation of wildlife . . . has long been recognized and whenever it can be done without violating any organic act of the land or without invasion of rights protected by constitution or treaty, it is recognized." (R. 26-27)

The fishing right under consideration in the *Tulee* case was a right to fish "at all usual and accustomed places, *in common with citizens of the Territory*" [emphasis supplied]. The very terms of the treaty thus impose a limitation on the fishing right. The right is to be shared with non-Indians. From this it could be deduced that where there is danger that the rights of either party may be destroyed by the other, the state may enact regulatory measures to protect them. For example, as this Court points out in *United States* v. *Winans*, *supra* with reference to the same treaty provision, neither party may place a fish wheel at a usual and accustomed place so as to

exclude the other party entirely. As the State would thus have the power to prevent Indians from fishing with fish wheels, it might have the power to take other, similar steps if they were designed to protect the fishing rights of non-Indians as guaranteed by the Treaty.

By contrast, the right to hunt, which is involved in this case, was not granted "in common with citizens of the Territory." This distinction between hunting and fishing appears to be a reasonable one if one considers that fishing is an important method of food-gathering for non-Indians as well as Indians. Hunting, on the other hand, was a primary method of food-gathering for Indians only. It still is today, to a large extent, a major source of food for the Nez Perce Indians. (See R. 27). The reason for the distinction in the treaty between the treatment accorded fishing and that accorded hunting is thus clear.

Conceivably the State could make certain regulations affecting the Indians' manner of hunting. It could, perhaps, prohibit the use of devices not envisaged at the time of the Treaty of 1855, such as spotlights, if the prohibition applies equally to non-Indians. What it can certainly not do is destroy the Indians' treaty right for certain months of the year. Limiting Respondent to hunt only during open season, the State Court pointed out "would mean that at certain times of the year his otherwise ancient right recognized by the treaty and never extinguished would for all practical purposes be extinguished." That result "was never intended under the broad, fair and liberal construction of the treaty" (R. 28). This last conclusion is the essence of the State Court's decision. It is in basic accord with this Court's decisions in *United States* v. *Winans*, 198 U. S. 371 (1905), *Seufert Bros. Co.* v. *United States*, 249 U. S. 194 (1919), and *Tulee* v. *Washington*, 315 U. S. 681 (1942).

CONCLUSION

As the decision below is correct, it is respectfully submitted that the petition be denied.

Respectfully submitted,

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